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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGIA PUBLIC SERVICE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (R. 91–99) is reported at 197 F. Supp. 793. It is reprinted in Appendix A, *infra*, pp. 20–30.

JURISDICTION

The judgment of the district court, embodied in its opinion, was entered on October 2, 1961 (R. 99), and a notice of appeal was filed by the United States on November 30, 1961 (R. 100). The jurisdiction of this Court rests upon 28 U.S.C. 1253 and 2101(b). *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73; *Public Utilities Commission of Cali-*

fornia v. *United States*, 355 U.S. 534; *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456.

QUESTION PRESENTED

Whether the district court erred in holding that the State of Georgia could constitutionally prohibit motor common carriers from contracting with the United States, for the intrastate transportation of household goods and personal effects of military and civilian personnel of the United States, at rates other than those prescribed by the Georgia Public Service Commission.

STATUTES AND REGULATIONS INVOLVED

Georgia Statutes. Sections 613, 614 and 9911 of the Georgia Motor Vehicle Code, Ga. Code Ann. 68–613, 68–614 and 68–9911, provide in pertinent part:

> 68–613. *Commission's powers over rates.*— The Commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage and property, and for all services rendered by motor common carriers in connection therewith, * * *.
>
> 68–614. *No discrimination in rates, service, etc.*—No motor common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of passengers and property or for any service rendered in connection therewith than the rates, fares and charges prescribed or approved by order of the Commission; * * *.
>
> 68–9911. *Motor common carrier regulations, violation of.*—Every officer, agent, or employee

> of any corporation and every person who violates or fails to comply with the provisions of Chapter 68–6 relating to the regulation of motor common carriers, or any order, rule, or regulation of the Public Service Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor.

Section 2506 of the Georgia Criminal Code (as amended, 1957), Ga. Code Ann. 27–2506, provides in pertinent part that misdemeanors are punishable by "a fine not to exceed $1,000, confinement in the county or other jail not to exceed six months," and forced labor "on the public works * * * not to exceed 12 months, any one or more of these * * *."

Federal Statutes and Regulations. Pertinent sections from the Public Contracts Procurement provisions, 63 Stat. 393, as amended, 41 U.S.C. 251–60; the Armed Services Procurement provisions, 70A Stat. 127, 10 U.S.C. 2301–14; the Armed Services Pay and Allowances provisions, 63 Stat. 813, as amended, 37 U.S.C. 253(c); the Administrative Expenses Act of 1946, 60 Stat. 806, as amended, 5 U.S.C. 73b–1; the Administrative Services Act of 1949, 63 Stat. 383, 40 U.S.C. 481; and relevant portions of General Services Administration, Department of Defense, and other federal regulations are set forth in Appendix B, *infra*, pp. 31–40.

STATEMENT

This is an appeal from a judgment of a three-judge district court for the Northern District of Georgia granting summary judgment against the United States in an action it had brought to restrain the Georgia

Public Service Commission from preventing, pursuant to statutes of the State of Georgia, rail and motor carriers from contracting with military or civilian agencies of the federal government for transportation within Georgia of household goods at rates other than those prescribed by the Commission. The government contended that the state regulatory system directly conflicted with governing federal transportation policies, in violation of the Supremacy Clause, Art. VI, cl. 2, of the Federal Constitution. The district court held, however, that the state regulations were not in conflict with any federal policy; that they merely imposed a non-discriminatory economic burden on the federal government and were therefore constitutional. The relevant facts, which are not in dispute, are as follows:

1. For many years the United States has negotiated special rate agreements with carriers for the shipment of property that it owns or is under obligation to transport (R. 2, 9, 39). This practice has been expressly recognized by the Congress in statutes authorizing the proper United States military and civilian officials to negotiate transportation rates for commodities shipped by the government (R. 3). See 41 U.S.C. 251–60; 10 U.S.C. 2301–14, *infra*, pp. 32–33. No distinction is made in this legislation or the regulations promulgated thereunder between interstate and intrastate shipments (R. 3, 40–41, 52, 87; see R. 42–48, 49–52, 54–73).[1]

[1] Transportation for the United States of goods moving in interstate commerce is specifically exempted from the rate regulations of the Interstate Commerce Act, 49 U.S.C. 22.

Household goods of military and civilian personnel of the federal government and their dependents constitute a significant part of the property transported under these special rate agreements. The assumption by the government of the expense for such transportation is expressly required by law. See 5 U.S.C. 73b–1; 37 U.S.C. 253(c), *infra*, p. 31. Where the transportation of such goods is between two government establishments, military or civilian, it is generally handled for the individuals concerned by transportation officers who make "all the arrangements with the carrier for the crating, packing, pickup, line haul and delivery of the property * * * [which] is shipped on a government bill of lading * * * [with] [t]he carrier * * * paid by a United States disbursing officer with a government check" (R. 39 (military); see R. 13–15, 49–52 (similar General Services Administration procedure for transferring household goods of civilian personnel)).

Within the State of Georgia there are approximately twenty-five military installations and a number of civil establishments (R. 2, 9). In 1960, moving among these installations, there were about "1,100 Georgia intrastate van carrier shipments" of "household goods" of members of the armed services alone (R. 10). These shipments weighed approximately four million pounds and cost the government about $175,000 (*ibid.*).[2] In addition, the cost of shipping

[2] Throughout the nation, approximately 100 million dollars per year is spent by the United States to transport the household effects of civilian and military personnel of the Department of Defense (R. 40).

within the State of Georgia household goods of personnel of civilian governmental agencies was substantial (R. 2).

2. On July 15, 1960, the United States Department of Health, Communicable Disease Center of Atlanta, Georgia, requested George D. Krueger, GSA Region IV Director, Transportation and Public Utilities Service, "to negotiate with carriers for the establishment of economical rates and charges to cover a mass movement of household goods and personal effects of Communicable Disease Center employees on transfer from Savannah to Atlanta, Georgia and vicinity" (R. 13). Krueger thereupon issued an invitation to fifty-four qualified Georgia carriers for bids (R. 13–14). In response, thirteen carriers submitted sealed bids; eight quoted rates and charges as published in Georgia Household Goods Tariff No. 1–B, MF No. 3; the remaining five carriers quoted rates different from those published in that tariff (R. 14, 17).

Upon an evaluation of all bids, the carriage contract was awarded to "the lowest responsive bidder," Consolidated Van and Storage Companies, Inc. ("Consolidated")—one of the five carriers submitting a bid on a basis other than that prescribed by the Commission's tariff (R. 14).[3] Several of the unsuc-

[3] Consolidated deviated from the tariff by quoting, in direct response to the GSA invitation for bids, a single per-hundred-pound rate for shipping and packing a mass shipment (R. 14). GSA had called for bids on a per-hundred-pound basis "to cover a mass movement of household goods and personal effects * * * on transfer from Savannah to Atlanta, Georgia * * *" (R. 13). The Georgia tariff did not permit quotation of a mass-shipment rate for transport of household goods of more than one family.

cessful bidders complained to the Commission that Consolidated had quoted other than approved rates; the Commission thereupon warned all five carriers whose bids deviated from the tariff that, if they performed at the rates quoted to GSA, the Commission would revoke their operating permits for violating its rules (*ibid.*). As a result of this threat, Consolidated, on August 23, 1960, notified GSA that it was defaulting on the contract (R. 14, 20). Unable to obtain carriage at other than rates approved by the Commission, GSA was forced to transport the approximately 43,676 pound shipment at the prescribed rates at an increase in cost of about 66⅔ percent over the charges originally quoted by Consolidated (see R. 28).

Notwithstanding the fact that Consolidated refused to perform its contract with GSA, the Commission, on September 26, 1960, issued a rule *nisi* looking towards revocation of Consolidated's certificate (R. 5, 19). An attorney for GSA, as a representative of the United States, appeared at the hearing and petitioned the Commission to allow the United States "to intervene in the proceeding and present evidence" as to the question whether the Commission had jurisdiction "to regulate the rates for shipments by the United States between points in Georgia" (R. 5). This petition was denied (*ibid.*). Moreover, the Commission refused to allow Krueger, the GSA official re-

---

Instead, it required carriers to quote a schedule of approved rates with the total charge to be the sum of charges figured individually on the basis of the weight of property shipped and packed for each family (Ga. Household Goods Tariff Bureau Agent, Tariff No. 1-B, GPSC MF-3, Rule 15 at p. 6; see R. 28).

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sponsible for negotiation of the contract, to testify as to the facts and circumstances of the transaction (R. 15).[4]

3. Faced with this situation in which carriers were being threatened with loss of their certificates if they submitted bids to the government for intrastate movement of household goods at rates other than those prescribed by the State Commission, the United States, pursuant to the provisions of 28 U.S.C. 1331, 1345, 2201, 2281 and 2284, filed a complaint in the United States District Court for the Northern District of Georgia on March 9, 1961 (R. 1). This complaint sought the convocation of a three-judge court pursuant to 28 U.S.C. 2284 and asked that court to enter a judgment (1) declaring that the Georgia statutes prohibiting carriers from entering into contracts for the intrastate shipment of property, including household effects, at rates other than those approved by the State Commission to be unconstitutional and void[5] in their application to contracts negotiated by the United States for the shipment of United States property or the household effects of United States personnel, and (2) permanently enjoin-

[4] We are informed that the Georgia Commission has deferred further proceedings in the Consolidated case pending the outcome of the present litigation.

[5] Subsequently, on motion to make the complaint more definite, the United States on May 17, 1961, limited the issue in the case to the "carriage of household goods and personal effects of personnel of the United States when the contract is the contract of the United States and the United States assumes the sole responsibility of paying the carrier for the carriage by the terms of the contract" (R. 76).

ing the Commission from taking any action or issuing any orders interfering with the ability of the United States and the various carriers to negotiate special arrangements with respect to rates for the transportation of such property (R. 7). An interlocutory injunction to prevent the Commission from regulating these rates pending hearing on the merits was issued (R. 33–34).

The complaint set forth the facts referred to above and alleged that "[a]s a result of the actions of the Georgia Public Service Commission as set forth above the carriers in the State of Georgia will not submit competitive bids for the carriage of property for the United States or enter into any contract with the United States for the carriage of property except at rates prescribed by the Commission, and the Commission continues to regulate such rates from day to day" (R. 5). Such activities were asserted to be unconstitutional and void under Article VI, clause 2, of the Federal Constitution (*ibid.*).

On April 28, 1961, the Georgia Public Service Commission moved to dismiss the complaint on the grounds that the cited Georgia statutes "do not in express terms apply to carriers transporting property for the Federal Government nor has the Supreme Court of Georgia ever construed these Code sections as to their applicability to carriers of property for the Federal Government" (R. 25). In its supporting brief the Commission merely reasserted that the state courts of Georgia had not previously construed the cited statutes with respect to whether and to what extent they applied to carriers of property of

the United States within the State of Georgia. It did not contend that the statutes were on their face ambiguous or could or should be interpreted as not applying to the intrastate transportation of goods for the government if such a construction would otherwise be consistent with the federal Constitution. In opposition, the United States pointed out that the construction of the Georgia statutes by the Commission was in accordance with the advice of the Attorney General of the State of Georgia (see R. 79–81, 82–84), that it had never been suggested that there was any question as to the applicability of the statutes to the federal government, except the constitutional one raised in the government's suit, and that under these circumstances dismissal of the action or holding it in abeyance pending reference to the appropriate state courts could only result in delaying resolution of the question to the detriment of the United States (R. 29–30).

On May 8, 1961, the three-judge district court denied the motion to dismiss. It held that "the plaintiff sought to intervene in one proceeding before the defendant touching on this question, and * * * its right to intervene was denied by the defendant, and * * * there is [not] any convenient or prompt or effective means by which the issue here presented can be passed upon by the courts of the State of Georgia, except by the filing of a suit in the Georgia courts by the United States" (R. 35).

The defendant on June 1, 1961, filed an answer admitting with respect to the transportation of household goods all of the material allegations of the com-

plaint except those relating to the procedures normally followed by the United States for handling such goods, which the answer neither admitted nor denied (R. 86–89). Specifically, the Commission's answer admitted the allegations that, as a result of the actions of the Commission, carriers licensed in the State of Georgia would not submit competitive bids except at rates prescribed by the Commission (R. 88). The Commission also admitted "that there is a real controversy between the United States and itself as to the constitutional authority of the defendant in pursuance of the Georgia statutory provisions above cited to regulate the rates which may be charged by carriers for the intrastate carriage of the household goods of the military personnel of the United States within the State of Georgia" (R. 89).

On the basis of the pleadings and several additional affidavits of military and civilian personnel, the United States filed a motion for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure (R. 37). A cross motion for summary judgment was filed by the Commission (R. 90). After oral argument the district court, on October 2, 1961, granted summary judgment for the Commission.

4. At the outset of its opinion the district court noted that the federal government has the power "to prevent any interference by way of state regulatory schemes upon the proper exercise of [federal] activities" and that the states cannot directly regulate the performance by federal officials of governmental functions (R. 92). Georgia's regulation of the rates at which the United States may ship the

household goods of its personnel within the state could only be upheld, the court concluded, if it constituted a non-discriminatory regulation that only "to some degree affect[ed] either the cost of the government's operation within the state or increase[d] difficulties touching on such operation" (R. 92–93). Thus, the issue presented was defined as whether "the Georgia laws place a direct prohibition on agencies of the federal government, or, if not, whether the federal laws authorizing the transportation in question impliedly prohibit inconsistent regulations" (R. 93).

Resolution of this issue, in the court's view, required only a determination of whether *Penn Dairies, Inc.* v. *Milk Control Commission,* 318 U.S. 261, or *Public Utilities Commission of California* v. *United States,* 355 U.S. 534, was controlling on the facts of the instant case. Disagreeing with the basis on which this Court in *California Commission* distinguished *Penn Dairies,* the district court concluded that the only true difference between the cases lay in the "character of the commodities dealt with" (R. 97).[6]

[6] In *Penn Dairies* this Court had found that the state statute "imposes no prohibition on the national government or its officers" (318 U.S. at 270). Finding, in *California Commission,* that the applicable state statute "places a prohibition on the Federal Government" (355 U.S. at 544), the Court concluded that *Penn Dairies* was not pertinent to the problem there involved. The district court below was "not able to conclude that the Supreme Court, in the *California* case, found any distinguishing characteristic here," because it concluded that both the Pennsylvania and California statutes involved in these cases "expressly provided sanctions against shippers who negotiated contracts other than as provided for by the regulatory agency" (R. 96).

It recognized that "there is less of a prohibition on the national government where a state [California] says it may negotiate contracts if it requests and obtains permission to do so, than where a state, like Pennsylvania and like Georgia, flatly says it may not negotiate at all" (R. 96). Nevertheless, the court ruled that "[s]ince the shipment of household goods * * * does not present the unique and difficult problems encountered when military supplies are involved" (R. 97), the decision in *Penn Dairies* was dispositive of this case.[7]

THE QUESTION IS SUBSTANTIAL

The decision of the district court is in direct and admitted conflict with the decision of the Supreme Court of Florida in *United States* v. *Carter*, 121 So. 2d 433 (see App. A, p. 29), and raises questions of widespread importance in the management of the government's extensive transportation operations.[8] It is also in conflict with the rule enunciated by this

[7] The court qualified this choice by stating: "Assuming that the *Penn Dairies* case still stands as a precedent, as we must, we are compelled to conclude that the Georgia Public Service Commission can legally do what the Georgia statute says it can do. If our assumption of the continuing vitality of *Penn Dairies* is incorrect it must remain for the Supreme Court to say so" (R. 99).

[8] The court below decided to assume jurisdiction over the case, rather than to await a determination by the state courts of Georgia, in view of the refusal of the State Commission to allow the United States to intervene as a party in its proceeding looking toward cancellation of the certificate of the carrier which had successfully bid at other than the prescribed rate. We think, in view of the unambiguous nature of the Georgia law (which clearly does not except the United States from its

Court in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534. The Court held there that the federal policy of negotiated rates for transportation of military equipment and the state policy of regulation of negotiated rates were in clear conflict with one another, in violation of the Supremacy Clause, Art. VI, cl. 2, of the federal Constitution. See *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187; *Johnson* v. *Maryland*, 254 U.S. 51; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 427. In this case the district court has held that the same federal policy, as incorporated in the statutes and regulations governing transportation of the household goods of military and civilian personnel of the federal government and their dependents (see App. B, *infra*, pp. 31–40), does not conflict with the policy of the State of Georgia (incorporated into its laws and the determinations of its Public Utilities Commission) prohibiting intrastate carriers from entering into negotiations with the federal government for transporting household goods at rates other than those prescribed by the Commission.

The district court, rejecting as factually invalid this Court's distinction in *California Commission*, *supra*, of its earlier opinion in *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, held that the transportation of household goods of military and civilian personnel was more closely analogous to the sale of milk to the government, involved in *Penn Dairies*, than

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coverage), this was a permissible action on the part of the federal district court. See *Query* v. *United States*, 316 U.S. 486, 490; cf. *Public Utilities Commission of California* v. *United States*, *supra* at 536–540.

to the transportation of military equipment, involved in the *California Commission* case. We think it erred on both grounds.

1. This Court in *California Commission* "put to one side" the *Penn Dairies* decision:

> There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." *Id.*, at 270. Here, however, the State places a prohibition on the Federal Government. [355 U.S. at 543–44.]

The court below, noting that under Pennsylvania law penalties could be imposed upon "any person" buying or receiving milk at less than approved prices, concluded that this Court could not have found any distinguishing characteristic between the two cases arising out of the differences in the impact of the sanctions (App. A, pp. 26–27). It reasoned, therefore, that the real distinction which this Court found must have lain in the "difference in the character of the commodities dealt with" (*id.* at 28). But, as this Court pointed out in *Penn Dairies* (p. 270), the federal government officials were not there faced with the alternative of paying the fixed Pennsylvania rate for milk or risking the penalties for obtaining lower prices; they could also seek to "procure a supply from without the state" (see *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511)—a possibility unavailable to the government here. In any event, the question is not

whether this Court in *Penn Dairies* erred in relying upon the state court's determination that sanctions could not be imposed upon federal officials (see 318 U.S. at 270). It did so rely and the Court in *California Commission* found this reliance sufficient to distinguish the situation where, as in the case of the Georgia law as well as that of California, criminal sanctions can be imposed on federal officers contracting with a carrier for a special rate (Ga. Code Ann. 68–9911).

2. But assuming *arguendo* that *Penn Dairies* is not distinguishable on the grounds given by this Court in *California Commission*, it does not follow that the federal-state conflict over the transportation of household goods of federal employees is more analogous to the government purchases of milk than to the situation involved in the *California Commission* case. The controlling question is whether there is a direct conflict between state regulation fixing the rates that carriers may charge for transporting household goods within the state and the federal regulatory scheme providing for negotiation of rates for carrying such goods for government personnel. This question is not, we believe, to be determined by an analysis of "the character of the commodities dealt with," as the district court concluded (App. A, p. 28), but rather by an analysis of the conflicting state and federal regulatory schemes.

This analysis, however, has already been made by this Court in the *California Commission* case. Involved there was an identical federal statute and similar regulations "sanction[ing] the policy of nego-

tiating rates for shipment of federal property and entrust[ing] the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken" (355 U.S. at 543, footnote omitted). The conflicting California regulatory scheme, as the court below recognized (App. A, p. 26), imposed, if anything, a lesser limitation on authorized federal activity than the Georgia regulatory scheme, in that California provided for the government's negotiation for lower rates with the approval of the state Commission whereas the Georgia prohibition on negotiated rates is absolute. The Court in *California Commission* (355 U.S. at 543) rejected the contention that the limitation upon federal activities was analogous to the non-discriminatory state taxes or regulations imposed on persons doing business with or for the federal government which it had upheld in such cases as *Alabama* v. *King & Boozer,* 314 U.S. 1; *James* v. *Dravo Contracting Co.,* 302 U.S. 134; and *James Stewart & Co.* v. *Sadrakula,* 309 U.S. 94. Instead, it held that the direct "conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be * * * as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve" (355 U.S. at 544). The case was analogized to the state regulatory plans held to conflict with the paramount federal scheme in *Arizona* v. *California,* 283 U.S. 423, 451; *Johnson* v. *Maryland,* 254 U.S. 51; and *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. 187. See also *Franklin National Bank* v. *New York,* 347 U.S. 373.

3. Where such a direct conflict exists, the fact that the impact upon the federal government is largely economic will not suffice to save the state regulatory policy. For, as this Court has long recognized, the federal government can establish financial procedures applicable to its activities which may not be upset by a state merely because its contrary regulatory system applies across the board and not merely to federal activities. See *Penn Dairies, supra* at 269. The fact that transportation of household goods—in those instances where it is not part of an over-all shipment of government property—may not involve all of the special problems to which this Court referred in *California Commission* thus does not take this case from under the rule of the *California Commission* decision, as the court below apparently believed. See *United States* v. *Warne,* 190 F. Supp. 645, 654–57 (N.D. Cal.), probable jurisdiction noted, *sub nom. Paul* v. *United States,* January 15, 1962, No. 239, this Term;[9] *Railroad Commission of Texas* v. *United*

[9] In *Paul* the issue presented relates to the conflict between the state and federal regulations governing the purchase of milk by the United States on three military reservations. While questions are raised as to whether the United States exercises exclusive jurisdiction over the places where the milk is sold, see *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California,* 318 U.S. 285, the United States in its Memorandum in Response to Jurisdictional Statement (at p. 6, n. 5) has expressly reserved its right to argue "that the California Milk Act is unconstitutional insofar as it compulsorily applies to distributor sales to the federal government" because it interferes with federal procurement officers in the performance of their duties "under the Armed Services Procurement Act and regulations issued thereunder."

States, 159 Tex. 197, 202, 317 S.W. 2d 927, 930. In any event, the undisputed record makes clear that more than a mere increase in the cost of the federal government's operations will be involved if the various transportation officials will have to comply, frequently in dealing with a single mass shipment of household goods, with one set of procedures for handling those going interstate and separate sets of procedures for handling those directed intrastate. (See R. 10–11, 41.)

CONCLUSION

The question presented is of importance and probable jurisdiction should be noted.

Respectfully submitted.

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MARCH 1962.

APPENDIX A

In the United States District Court, Northern District of Georgia, Atlanta Division

No. 7528 Civil Action

UNITED STATES OF AMERICA, PLAINTIFF

v.

GEORGIA PUBLIC SERVICE COMMISSION, DEFENDANT

PER CURIAM.

The United States sues to prevent the Georgia Public Service Commission from regulating tariffs charged by carriers within the state of Georgia for the intrastate shipment of household goods of government employees under contracts made with the carriers by government agencies.

The state Commission is under the duty to prevent discriminatory rates for intrastate shipments.[1] It conceives it to be its duty to prevent carriers from contracting with military or other federal government agencies to carry household goods of individual employees of the United States, when such shipments are wholly within the state of Georgia, at less than the published tariffs.

No issue is presented touching on the right of the Commission to regulate the rates charged by Georgia carriers for the carriage of strictly governmental property. The Commission concedes that this issue has been foreclosed in favor of the United States by

[1] See Georgia Code Ann. §§ 93-309, 93-310 and 93-407, as to railroad transportation. See Georgia Code Ann. §§ 68-613, 68-614 and 68-9909, as to motor carrier transportation.

Public Utilities Commission of California v. *United States*, 355 U.S. 534 * * *.

The United States contends that since the carriage of the household goods of its employees, where authorized by law at government expense, is a proper exercise of the constitutional power of the government to engage in the enterprise, it makes no difference whether the carriage is of government property or is of personal property for the moving of which the government is liable. The policy of the federal government to arrange for carriage services, whether by bid or negotiation, at the cheapest responsible price, the government says, is the same in either case.

The Georgia Commission seeks to distinguish the facts here from those which resulted in the Supreme Court's adverse decision in the *California* case, saying that the Court is here dealing with a fact situation that calls for application of the principles laid down by the Supreme Court in the case of *Penn Dairies, Inc., et al.* v. *Milk Control Commission of Pennsylvania*, 318 U.S. 261 * * *.

The case is not a simple one to resolve. All parties agree that under the supremacy clause of the Federal Constitution the federal government has the power, if it elects to exercise it, to prevent any interference by way of state regulatory schemes upon the proper exercise of activities constitutionally engaged in by the federal government.

> It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from its own influence. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 427 * * *.

It is also clear that short of state taxation of the national government or state regulation of the performance of federal officials and agencies of governmental functions, *Ohio* v. *Thomas*, 173 U.S. 276 * * *; *Johnson* v. *Maryland*, 254 U.S. 51 * * *; *Hunt* v. *United States*, 278 U.S. 96 * * *; *Arizona* v. *California*, 283 U.S. 423 * * *, the states may, in the absence of congressional enactment, adopt non-discriminatory taxing statutes, and non-discriminatory regulations under the state's police power that may to some degree affect either the cost of the government's operation within the state or increase difficulties touching on such operation, *Alabama* v. *King & Boozer*, 314 U.S. 1 * * *; *United States* v. *Baltimore & Annapolis R.R. Co.*, 308 U.S. 525 * * *; *Penn Dairies, Inc., et al.*, v. *Milk Control Commission, supra.*

The question we have here to decide, therefore, is whether the Georgia laws place a direct prohibition on the agencies of the federal government, or, if not, whether the federal laws authorizing the transportation in question impliedly prohibit inconsistent regulations.

The state's main reliance is on the Penn Dairies case, supra. There, notwithstanding an existing federal statute authorizing the military services to purchase by bid or negotiated contract the articles of food and other supplies needed for the armed services, the Supreme Court held that a contract made by a Pennsylvania dairyman for supplying the military forces in Pennsylvania at prices less than the established price of the Pennsylvania Milk Control Commission, could validly be treated by the Pennsylvania Commission as a basis for revoking the license of the dairy. The Court dealt with the matter in terms of the legality of the regulatory scheme of the Milk Control Commission when in conflict with the federal

scheme of authorizing purchases at the lowest available price. The Court said [318 U.S. 261 * * *]:

> The dairy's answer to the citation challenged the constitutional authority of the state to regulate prices charged to the United States.

The Court answered this question by saying:

> Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below * * *; 148 Pa. Super. 270–271 * * *. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin* v. *Seelig*, 294 U.S. 511. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama* v. *King & Boozer*, *supra*; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in *Baltimore & Annapolis R. Co.* v. *Lichtenberg*, *supra*; or the local building regulations applied to a contractor engaged in constructing a postoffice building for the government, sustained in *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94 (318 U.S. 261, 270) * * *.

The record discloses that many state Public Service Commissions assumed from the language and decision of the Penn Dairies case that they were thus free to regulate the rates to be charged the government uniformly with those to be charged with other shippers for intrastate shipments of government property. This attitude on the part of the California Public Service Commission produced *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 * * *. The California statute, in effect, provided that its Commission should make uniform rates and see to their application without discrimination. It had a special provision, however, favorable to the United States. It provided that upon application by the United States the Commission had the power to authorize variations from the approved tariffs. Objecting to the necessity of applying in each case for the privilege of negotiating a freight rate for the carriage of the many military shipments within the state, the United States brought a suit before a statutory three-judge court in California to enjoin the interference by the Commission with the government's negotiation of rates with carriers as might be agreed upon. All of the evidence dealt with in that case touched upon the transportation of government property. Much of the evidence demonstrated the need for unfettered handling of many of the important and some secret cargoes needed by the military forces.

The federal statutes which established the policy of the United States (10 U.S.C.A. §§ 2301–2314) as implemented by regulations were stated by the Supreme Court to "sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when nego-

tiation for lower rates will be undertaken." 355 U.S. 534, 543 * * *. The Court then said:

> It also seems clear that under Section 530 of the California Public Utilities Code this discretion of the federal officers may be exercised and reduced rates used only if the Commission approves. The question is whether California may impose this restraint or control on federal transportation procurement.

The Court answered this question in the negative, and distinguished Penn Dairies on the ground that:

> There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." Id. at 270. Here, however, the state places a prohibition on the federal government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear.

Our task then is twofold. First, we must determine the factual basis for the distinction drawn in the *California* case between that case and *Penn Dairies*. Second, we must decide which of these two cases more closely parallels the one before us for decision.

The state of Georgia argues that the procedural plan of the California law which put the burden on the United States to apply for special treatment was a distinguishing feature, since it is apparent that under the Pennsylvania law there was an absolute prohibition against the sale of milk at less than the established price and the United States was not named or in any way singled out. The state contends that when the Supreme Court, in the *California* case, called attention to the fact that the Pennsylvania regulation "imposes no prohibition on the national government

or its officers" it sought to point up this procedural matter, since the California law did impose on the national government the need to apply for an exemption if it wanted one. This, it seems to us, is clearly untenable. Certainly there is less of a prohibition on the national government where a state says it may negotiate contracts if its requests and obtains permission to do so, than where a state, like Pennsylvania and like Georgia, flatly says it may not negotiate at all.

In the *California* case, the Court noted that:

> * * * the Public Utilities Code provides penalties for violations of its provisions and orders issued thereunder. §§ 2107, 2112. These penalties are applicable not only to the carrier but to shippers as well. California Public Utilities Code, § 2112. As stated by the District Court, "If a United States officer were to negotiate with a carrier for 'reduced rates' without permitting the defendant to determine whether it 'considered' the conditions of the contract 'just and reasonable', he could be thrown into the county jail." 141 F. Supp., at 186.

In *Penn Dairies,* on the other hand, the Court expressly stated that, "Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty." 318 U.S. at 270 * * *. The basis for this statement completely escapes us. An examination of the Pennsylvania Milk Control Act reveals that penalties can be imposed on "any person" who "buys or receives" or "offers to buy or receive" milk at other than the approved prices (31 Pa. Stat. § 700j–807).

In view of the fact that both the California law and the Pennsylvania law expressly provided sanctions against shippers who negotiated contracts other

than as provided for by the regulatory agency, we are just not able to conclude that the Supreme Court, in the *California* case, found any distinguishing characteristic here. Moreover, the Courts which have followed the *California* case in striking down state regulatory legislation in the field of transportation have not even mentioned the penalty issue in reaching their decisions. See *Hughes Transportation, Inc.* v. *United States* (Court of Claims 1958), 168 F. Supp. 219, certiorari denied (1959); 359 U.S. 968 * * * [Kentucky Statute]; *Union Transfer Co.* v. *United States* (Court of Claims 1958), 168 F. Supp. 217, certiorari denied (1959) * * * [Nebraska Statute]; *United States* v. *Pennsylvania Public Utility Commission* (1958), 393 Pa. 537, 143 A. (2d) 341, certiorari denied (1958), 358 U.S. 884 * * * [Pennsylvania Statute]; *Railroad Commission of Texas* v. *United States*, 159 Tex. 197 (1958), 317 S.W. 2d 927, [Texas Statute]; *United States* v. *Pentecost, Chairman Tennessee Public Service Commission*, rule 7844 Chancery part 2, Nashville, Tennessee [Tennessee Statute]. See also *Benton Rapid Express, Inc.* v. *United States* (Ct. Cl. 1959), 171 F. Supp, 868, 872 [Georgia Statute]; *Alabama Highway Express, Inc.* v. *United States* (Ct. Cl. 1959), 175 F. Supp. 143, 146 [Alabama Statute]; *United States of America* v. *Carter, et al.* (Florida), 121 So. 2d 433, 437.

In light of the foregoing analysis, we cannot say that the provisions for penalties in the Georgia Statutes (Ga. Code Ann. §68–9909) compels us to follow the California case here.

Finally, the state comments on the distinction between the need for the right to negotiate for the shipment of strictly military goods (the issue in the California case) and the need for the right to negotiate for the purchase of milk (the issue in Penn Dairies) or the shipment of household goods (the

issue in the instant case). Since there are no other significant factual distinctions between *California* and *Penn Dairies*, we can only conclude that the difference in the character of the commodities dealt with was the element which the Supreme Court thought justified its departure in the *California* case from the rule previously followed in *Penn Dairies*. The following language from the opinion in the *California* case is revealing [355 U.S. 534 * * *]:

> The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record.
>
> It is the practice of the Government not only to negotiate separate rates which vary from the class or "paper rate" but also to negotiate a "freight all kinds" rate which will cover hundreds of diverse items for the supply of a division of the Army or for a vessel that are needed at one place at one particular time. There is no provision in the California Code or the regulations for the making of such shipments. The findings are that if the Code is applied here, this type of arrangement would be abolished:
>
> "This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipment of one truckload or carload. In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made."

> Moreover, no rates exist for much of the military traffic, which means that, unless the United States can negotiate rates for each shipment, the shipments will be delayed for Commission action unless shipped under the established rates which are higher than negotiated rates.
>
> General Edmond C. R. Lasher of the United States Army, who was Assistant Chief of Transportation, testified at the trial: "for us to make these arrangements at the Washington level with the various states, let us say 48 States, with 18 varieties of methods to follow, we would find ourselves in an administrative morass out of which we would never fight our way, we would never win the war." 355 U.S. 534, 545, 546 * * *.

See also the discussion as to the significance of the military character of the carriage in the dissenting opinion, 355 U.S. at pages 550 and 551 * * *.

Since the shipment of household goods by the United States does not present the unique and difficult problems encountered when military supplies are involved, it appears that the case before us has more in common with *Penn Dairies* than with *California Commission* v. *United States*. This being so, we must conclude that *Penn Dairies* controls our determination of the issue here.

We do not overlook the fact that our conclusion is at odds with that taken by the Supreme Court of Florida in *United States* v. *Carter, et al, supra*, the only litigated case actually deciding the precise issue involved here, and with the practice followed by a number of state regulatory commissions which have interpreted the California decision as barring state interference with the negotiation of rates for the ship-

ment of household goods by the United States. Since, however, the Supreme Court, in the *California* case, did not overrule *Penn Dairies* but was at pains to distinguish it, there remains the necessity for us to determine which of these cases governs the issue here presented. We have, therefore, examined the cases carefully, and have decided that Georgia's attempt to regulate the rates at which the United States may ship household goods of its military and civilian personnel presents the same issue as was presented by Pennsylvania's attempt to set the price at which the United States could purchase milk for its military personnel. Assuming that the *Penn Dairies* case still stands as a precedent, as we must, we are compelled to conclude that Georgia Public Service Commission can legally do what the Georgia tatute says it can do. If our assumption of the continuing vitality of *Penn Dairies* is incorrect it must remain for the Supreme Court to say so.

It follows that judgment is entered for the defendants on their motion for summary judgment.

This 2nd day of October 1961.

ELBERT P. TUTTLE,
United States Circuit Judge.

FRANK A. HOOPER,
United States District Judge.

BOYD SLOAN,
United States District Judge.

APPENDIX B

Federal Statutory Provisions

1. The Administrative Expenses Act of 1946, 60 Stat. 806, as amended, 5 U.S.C. 73b–1:

> § 73b–1. Travel expenses of transferred employees; transportation of families; household goods and personal effects * * *.
>
> (a) Under such regulations as the President may prescribe, any civilian officer or employee of the Government who, in the interest of the Government, is transferred from one official station to another, * * * for permanent duty, shall * * * be allowed and paid from Government funds the expenses of travel of himself and the expenses of transportation of his immediate family * * * and the expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of his household goods and personal effects * * *.

2. Armed Services Pay and Allowances, 63 Stat. 813, as amended, 37 U.S.C. 253(c):

> (c) Transportation in kind for dependents on change of station; monetary payment in lieu of transportation; baggage and household effects * * *.
>
> In addition to the [travel and transportation] allowances authorized above, under such conditions and limitations * * * as may be prescribed by the Secretaries concerned, members of the uniformed services when ordered to make a change of permanent station shall be entitled to transportation in kind for dependents * * *, to transportation (including

packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects or reimbursement therefor * * *.

3. The pertinent Public Contracts Procurement provisions are 63 Stat. 393, as amended, 41 U.S.C. 251–260. Section 252 provides:

§ 252. Purchases and contracts for property.

(a) Applicability of chapter; delegation of authority.

The provisions of this chapter shall be applicable to purchases and contracts for property or services made by—

(1) The General Services Administration for the use of such agency or otherwise * * *.

* * * * *

(c) Negotiated purchases and contracts for property; conditions.

All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

* * * * *

(2) The public exigency will not admit of the delay incident to advertising;

* * * * *

(10) for property or services for which it is impracticable to secure competition;

* * * * *

(14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable * * * or have not been independently arrived at in open competition: *Provided,* That * * * (B) the negotiated price is the lowest negotiated price offered by any responsible supplier * * *.

* * * * *

4. The pertinent Armed Services Procurement provisions are 70A Stat. 127, 10 U.S.C. 2301–2314. Section 2304 provides:

> § 2304. Purchases and contracts: formal advertising; exceptions.
>
> (a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—
>
> * * * * * *
>
> (2) the public exigency will not permit the delay incident to advertising;
>
> * * * * * *
>
> (10) the purchase or contract is for property or services for which it is impracticable to obtain competition;
>
> * * * * * *
>
> (15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable * * * or were not independently reached in open competition, and for which * * * (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier * * *.

5. The Administrative Services Act of 1949, 63 Stat. 383, 40 U.S.C. 481:

> § 481. Procurement, warehousing, and related activities.
>
> (a) The [GSA] Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service * * *.

(1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as * * * transportation * * *.

* * * * * *

(4) with respect to transportation * * * for the use of executive agencies, represent such agencies in negotiations with carriers and in proceedings involving carriers * * * before Federal and State regulatory bodies * * *.

FEDERAL REGULATIONS

1. Executive Order 10530, 3 CFR, 1954–1958 Compilation, pp. 189–190:

* * * * *

SECTION 1. The Director of the Bureau of the Budget is hereby designated and empowered to perform the following-described functions without the approval, ratification or other action of the President:

* * * * *

(b) the authority vested in the President by [5 U.S.C. 73(b)–1(a), 73(b)–1(b)] to prescribe regulations (1) with respect to the allowance and payment from Government funds of the expenses of travel of any civilian officer or employee of the Government transferred from one official station to another for permanent duty, the expenses of transportation of his immediate family * * *, and the expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of his household goods and personal effects; and (2) with respect to reimbursement to such officer or employee on a commuted basis in lieu of the payment of actual expenses of transportation * * * of his household goods and personal effects * * *

2. Bureau of the Budget Circular No. A–37, December 30, 1957:

Subject: Regulations prescribing revised commuted rates of reimbursement for transportation and temporary storage expenses for household goods and personal effects of civilian officers and employees upon transfer of official station within the continental United States

[Schedules of rates omitted.]

3. Bureau of the Budget Transmittal Memorandum No. 4, February 20, 1960, amending Circular No. A–37:

* * * * *

1. *Purpose.* The regulations prescribed in Bureau of the Budget Circular No. A–37 of December 30, 1957, * * * are amended * * * to provide for use of Government bills of lading for transportation of household goods, instead of the commuted-rate system, for mass movements of household goods transferred between the same two official stations when significant savings will result.

4. Relevant General Services Administration orders:

A. Adm 5450.3, Change 4, July 31, 1959:

* * * * *

142. AUTHORITIES. The Commissioner, TP-US, in carrying out his assigned program responsibilities exercises authority, such as, but not limited to, the following:

a. *Procurement and Contracting.*

* * * * *

(a) Negotiates purchases and contracts for property and services without advertising, and makes any determinations and decisions required in connection therewith * * *.

* * * * *

189. TRANSPORTATION OPERATIONS DIVISION.

* * * * *

b. Negotiates and administers contracts and agreements for special services for which made responsible, such as packing and crating, drayage, * * * and the movement of personal property to new locations for GSA and executive agencies.

B. TPS 7460.1, March 15, 1960:

* * * * *

3. *Objective:*—The objective is to evaluate mass movements of household goods and personal effects and, when feasible, to negotiate with carriers to effect the most economical basis for the movement of such household goods and personal effects.

* * * * *

7. *Requesting Rates From Carriers.*

a. *General.*—When the evaluation by TPUS indicates that savings to the Government * * * may result from arranging with carriers for rates for a mass movement of household goods and personal effects, TPUS shall request eligible carriers to submit rate offers or bids.

b. *Methods used.*

(1) *Formal advertising.* * * *

* * * * *

(2) *Negotiation.*—When the exigency of the movement will not admit of the delay incident to formal advertising, negotiation for the services is authorized. * * *

C. TPS P 7200.3, Change 1, April 4, 1960:

* * * * *

CHAPTER 3. PROCUREMENT AND DISPOSAL ASSISTANCE

PART 1. TRANSPORTATION ASPECTS

* * * * *

4. *Applicability.*—This chapter contains policies and procedures for the guidance of transportation and procurement officials. It is the responsibility of the transportation official to

determine the appropriate delivery terms and advise and assist procurement officials in their use; it is the responsibility of the procurement official to determine the appropriate application of these terms to individual purchase transactions.

5. Relevant Department of Defense Regulations:

A. The Military Traffic Management Regulation [promulgated by order of the Secretaries of the Army, the Navy, and the Air Force], March 1958:

* * * * * *

CHAPTER 102. GENERAL RESPONSIBILITIES AND TRAFFIC MANAGEMENT POLICIES

* * * * * *

102003 *Selection of Carriers or Modes of Transportation.*— * * * In the selection of commercial carriers, the means of transportation selected will be that which produces the lowest overall cost consistent with military requirements, the objectives of governing procurement regulations and the transportation policies as expressed by the Congress. * * *

* * * * * *

CHAPTER 201. FREIGHT TRAFFIC NEGOTIATIONS

201001 *Responsibilities of the Executive Director.*—The Executive Director, Military Traffic Management Agency, is responsible within the Department of Defense for—

a. Determination of proper freight classification, rates, charges, rules and regulations on military traffic.

b. Negotiation with all for-hire carriers of cargo or their rate-making agencies for classifications, rates, charges, rules and regulations on military traffic * * *.

* * * * * *

h. Reviewing and maintaining surveillance over new and reissued freight tariffs and tariff

supplements to determine changes made thereby which would affect the routing or cost of moving military traffic.

i. Reviewing of all for-hire commercial carrier dockets or other proposals to determine the extent to which military traffic would be affected thereby, and taking action required.

j. Recommending litigation in the transportation and traffic management areas when necessary to protect or promote the interests of the Department of Defense.

k. Receipt on behalf of the military departments of all negotiated and voluntary or unsolicited rate tenders relative to—

* * * * *

(5) Rates.

(6) Adjustment of tariff provisions.

(7) Special arrangements pertaining to * * * freight traffic * * *.

* * * * *

201005 *Freight Rate Negotiations. a. Opportunities for rate negotiations.*—Local transportation officers will be constantly alert to identify opportunities for rate negotiations as far in advance of movement as possible. They will forward this information * * * whenever—

(1) A planned volume movement is scheduled to move from one point of origin to one point of destination, for which the transportation charges will be paid by the Government. * * *

(2) A specific movement not of sufficient volume to report under (1) above that because of peculiar characteristics and/or circumstances presents a need for investigation of present transportation costs and possibility of an adjustment thereof.

* * * * *

CHAPTER 214. BILLS OF LADING

* * * * *

*214009 *When Government Bills of Lading Are Required.*—Government bills of lading are required for all shipments moving via commercial carriers between points in the continental United States for which the Government is responsible for payment of transportation charges direct to carriers concerned, except when departmental regulations provide otherwise.

B. The Joint Travel Regulations, Chapter 8, April 1, 1959, provide:

TRANSPORTATION OF HOUSEHOLD GOODS

* * * * *

*8001 DETERMINATION OF MODE OF SHIPMENT

Transportation of household goods is authorized by the mode of transportation * * * which results in the lowest overall cost to the Government and which provides the required service satisfactorily. If the lowest over-all cost mode cannot provide the required service satisfactorily, the next lowest cost mode shall be used. * * *

C. Directive No. 4500.27, July 1, 1960:

Subject: Transportation of household goods of civilian and military personnel

* * * * *

I. *Purpose, Applicability and Objective*

* * * * *

B. The objective of this Directive is to assure high quality service to military and civilian personnel of the Department of Defense in the transportation of their household goods at the lowest over-all cost to the Government.

V. *Implementation*

A. The single manager for Traffic Management * * * is assigned authority and responsibility for:

* * * * *

3. Negotiating with commercial carriers and operators on all matters incident to the transportation of household goods within the United States * * *.

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